

Study N-301

October 8, 1997

Second Supplement to Memorandum 97-68**Administrative Rulemaking: Interpretive Guidelines**

We received the attached letter from Professor Gregory L. Ogden, a Commission consultant for the Administrative Rulemaking study. He writes to express his agreement with the recommendations made in Memorandum 97-68.

Respectfully submitted,

Brian Hebert
Staff Counsel



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October 3, 1997

Law Revision Commission
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Executive Director Nat Sterling
California Law Revision Commission
4000 Middlefield Road, ROOM D-1
Palo Alto, CA 94303-4739

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File: _____

Re: Memorandum 97-49, Administrative Rulemaking: Interpretive Guidelines

Dear Nat:

I have read Memorandum 97-68, Administrative Rulemaking: Interpretive Guidelines, and have the following comments about the recommendations in that memorandum:

1. Advisory Interpretation: I support the terminology change for the reasons suggested, that the name change is consistent with the lack of legal effect of these interpretations, and using this label distinguishes these interpretations from other guidelines that may be legally binding.
2. Statement of Legislative Purpose: I support the statement of legislative purpose, and the language of proposed Section 11360.010. This proposed section cleanly and clearly differentiates between advisory interpretations, and other types of rulemaking.
3. Judicial Deference: The typical rationale for judicial deference to agency interpretations is agency expertise. That is still a good rationale for courts considering an issue of statutory interpretation when the agency has adopted and followed an interpretation for a period of time. The court can benefit from the agency's experience in enforcing the law, and making interpretations. However, given the current climate, the most important goal here is to encourage agencies to make advisory interpretations public, so that a no deference rule is supportable as the price of adoption of the overall proposal.
4. Third party Enforcement: I support the recommendation, that advisory interpretations do not provide a basis for third party suits, and that the advisory interpretation is binding only on the agency, not on third parties. Binding third parties would also take the interpretation out of the advisory category, and might require the agency to initiate rulemaking proceedings, in which the third party would have the right to comment on the proposal before it was adopted. Binding third parties is also inconsistent with the advisory nature of the interpretations in this recommendation.
5. Post Adoption Review: I support the proposal to provide post adoption review by OAL of advisory interpretations when requested, with subsequent review of OAL decisions by the Governor and the courts. However, I wonder who can request OAL review of an advisory

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interpretation. Can any member of the public, or only affected interests such as industries regulated by the agency that has adopted the advisory interpretation.

6. Standard of Review: I support the staff recommendation as to OAL review, for consistency, and authority. As to consistency, the adopting agency has the statutory authority to make the interpretation and to enforce the relevant statute, and that agency has the experience and the expertise to make the interpretation. OAL does not possess this experience, and expertise. There is no reason why OAL review should be any different here than otherwise. As to authority, I agree with the staff proposal, for the reasons stated. Agencies have inherent authority to interpret the statutes that the agency enforce or administers.

7. Publication: I support using the "precedent decision" approach for publication, and I support mandatory Internet publication for agencies with existing web sites.

8. CEQA Guidelines: an express CEQA guideline is unnecessary with the proposed language of Section 11360.010, and it is also unwise as a matter of policy.

9. Nonenforcement Review: I support judicial review of any advisory interpretation after OAL review.

Sincerely,


Gregory L. Ogden
Professor of Law